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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 331

EUCLID NATIONAL BANK,

Petitioner,

v.

THE FEDERAL HOME LOAN BANK BOARD
and
THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Circuit Court of Appeals For the Sixth Circuit.

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PETITION FOR A WRIT OF CERTIORARI
To the United States Circuit Court of Appeals For the Sixth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on May 7, 1968.

CITATIONS TO OPINIONS BELOW.

The memorandum opinion of the United States District Court for the Northern District of Ohio, Eastern Division, is unreported and printed in Appendix B (1) hereto, *infra*, p. 11. The opinion of the United States Court of Appeals for the Sixth Circuit hereto, *infra*, p. 15, is unreported and is printed in Appendix B (2).

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Sixth Circuit was entered on May 7, 1968. The jurisdiction of this Court is invoked under Title 28 U. S. C. 1254 (1).

QUESTION PRESENTED.

Can the Federal Savings and Loan Insurance Corporation collect and retain an insurance premium for insuring depositors accounts in a National Bank when the laws of the United States of America designate the Federal Deposit Insurance Corporation as the only agency that can insure said accounts, carry the risk and collect the premium for said insurance coverage?

STATUTE AND REGULATIONS.

The statutory provisions and regulations involved are sections of the National Housing Act as Amended 12 U. S. C. 1724 et seq. and various Rules and Regulations for Insurance of Accounts, 12 CFR, Chapter V, Subchapter D, 12 U. S. C. Chapter 2, Sec. 35; Chapter 16, Sec. 1814(b), as printed in Appendix "A," *infra*, pp. 5-10.

STATEMENT.

The plaintiff-appellant, Euclid National Bank, is a national banking institution doing business under the National Banking laws of the United States in Ohio; and on February 1st, 1966, it was converted from an Ohio chartered building and loan association, doing business in Ohio under the name of Euclid Savings Association, to Euclid National Bank.

Euclid National Bank, prior to the time of its conversion on February 1st, 1966, was an insured institution

under the National Housing Act as amended (12 USC 1724, et seq.), by reason of which the savings accounts of its depositors were insured by the defendant-appellee Federal Savings and Loan Insurance Corporation.

Under the terms and conditions of the National Housing Act, Euclid did pay insurance premiums to the Federal Savings and Loan Insurance Corporation. The anniversary date for the payment of such premiums was November 21st of each year. The defendant-appellee Federal Savings and Loan Insurance Corporation billed Euclid for an annual premium for the year commencing November 21st, 1965, and Euclid paid the first one-half of the premium in accord with defendant-appellee's Insurance Premium Notice and paid the second one-half of the premium on April 26, 1966, after demand of the defendant-appellee at a time when it was a national bank.

Following Euclid's conversion to a national bank on February 1st, 1966, its status as an insured institution under the National Housing Act as amended was terminated by law. Upon conversion, the accounts of Euclid's depositors became insured by FDIC and Euclid demanded return of that portion of its premium allocable for the period from February 1st, 1966 to November 21st, 1966, said demand was refused by defendant-appellee Federal Savings and Loan Insurance Corporation. Euclid thereafter filed an action for a declaratory judgment setting forth the claim that it was entitled to the return of the portion of the unearned insurance premium for the period from February 1st, 1966, to November 21st, 1966, the total premium paid for the year being $26,441.26.

The United States District Court, Northern District of Ohio, Eastern Division, dismissed Petitioner's Complaint on the basis of the facts set forth in its memorandum opinion set forth in Appendix B (1).

The United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court in this action.

REASONS FOR GRANTING WRIT.

1. The question presented is important to all eligible financial institutions desiring to convert to a National Bank under Title 12, U. S. C. Sec. 35. Settlement of this question by this Court is plainly in the public interest and necessary as a guide line in any conversion to a National Bank.

2. It is important to establish whether or not two agencies can collect premiums when only one carries the risk.

3. The decision of the Court below is believed to be erroneous because unearned insurance premiums cannot be collected or retained by an insurer who fails to have the ability to carry the risk. In this connection, the authority cited by the Court of Appeals has no application to the facts presented.

Further, it is well settled by custom in the insurance industry that insurer's inability to continue the risk assumed leaves no legal or valid basis to insist upon or retain unearned premiums.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BINGHAM W. ZELLMER,
Counsel for Petitioner.

MAXWELL J. GRUBER,
R. DUGALD PEARSON,
Of Counsel.

APPENDIX A.

STATUTES AND REGULATIONS.

Insurance of Accounts and Eligibility Provisions

Sec. 403. (a) It shall be the duty of the Corporation to insure the accounts of all Federal savings and loan associations, and it may insure the accounts of building and loan, savings and loan, and homestead associations and cooperative banks organized and operated according to the laws of the State, District, Territory, or possession in which they are chartered or organized.[1]

(b) Application for such insurance shall be made immediately by each Federal savings and loan association, and may be made at any time by other eligible institutions. Such applications shall be in such form as the Corporation shall prescribe, and shall contain an agreement (1) to pay the reasonable cost of such examinations as the Corporation shall deem necessary in connection with such insurance, and (2) if the insurance is granted, to permit and pay the cost of such examinations as in the judgment of the Corporation may from time to time be necessary for its protection and the protection of other insured institutions, to permit the Corporation to have access to any information or report with respect to any examination made by any public regulatory authority and to furnish any additional information with respect thereto as the Corporation may require, and to pay the premium charges for insurance as hereinafter provided. * * *[2]

* * * * *

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[1] 12 U.S.C. 1726(a).

[2] 12 U.S.C. 1726(b).

Premiums on Insurance

Sec. 404.

* * * * *

(b)(1) Each institution whose application for insurance is approved by the Corporation shall pay to the Corporation, in such manner as it shall prescribe, a premium for such insurance equal to one-twelfth of 1 per centum of the total amount of all accounts of the insured members of such institution plus any creditor obligations of such institution. Such premium shall be paid at the time the certificate is issued by the Corporation under section 403, and thereafter annually, except that under regulations prescribed by the Corporation such premium may be paid semiannually. [3]

* * * * *

Termination of Insurance and Enforcement Provisions

Sec. 407.

* * * * *

(d) CONTINUATION OF INSURANCE; EXAMINATION; NOTICE TO MEMBERS; PAYMENT OF PREMIUMS.—In the event of the termination of an institution's status as an insured institution, insurance of its accounts to the extent that they were insured on the effective date of such termination as hereinabove provided in subsection (c), less any amounts thereafter withdrawn, repurchased, or redeemed, shall continue for a period of two years, but no investments or deposits made after such date shall be insured. The Corporation shall have the right to examine such institution from time to time during the two-year period aforesaid. Such insured institution shall be obligated to pay, within thirty days after the effective date

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[3] 12 U.S.C. 1727(b)(1).

of such termination, as a final insurance premium, a sum equivalent to twice the last annual insurance premium payable by it. In the event of the termination of insurance of accounts as herein provided the institution which was the insured institution shall give prompt and reasonable notice to all of its insured members that it has ceased to be an insured institution and it may include in such notice the fact that insured accounts, to the extent not withdrawn, repurchased, or redeemed, remain insured for two years from the date of such termination, but it shall not further represent itself in any manner as an insured institution. In the event of failure to give the notice to insured members as herein provided the Corporation is authorized to give reasonable notice.[4]

* * * * *

Excerpts From Rules and Regulations for Insurance of Accounts

(12 CFR, Chapter V, Subchapter D)

* * * * *

PART 563—OPERATIONS

* * * * *

§ 563.16—Premiums in mergers, consolidations, or purchases of bulk assets.

In the event of the purchase of bulk assets by an insured institution or of the absorption by an insured institution of another institution through merger or consolidation and the issuance of accounts of an insurable type in connection therewith, such insured institution will be billed for an additional premium based upon the aggregate

[4] 12 U.S.C. 1730(d).

of the increase of its accounts of an insurable type issued in connection with such transaction. Such premium shall be computed at the rate prescribed by law and shall be that proportion of the amount so computed which the unexpired portion of such insured institution's insurance year bears to its entire insurance year: *Provided, however,* That if the institution which is absorbed by such insured institution by such merger, consolidation, or purchase of bulk assets is an insured institution, the insured institution which has so absorbed such other insured institution shall receive a credit upon its future premiums of the unearned portion of any premium of such absorbed institution to the extent that the same has been paid, and the unearned portion of any premium of such absorbed institution shall, to the extent that the same has not been paid, be canceled.[5]

* * * * *

Part 565—Termination of Insurance

* * * * *

§ 565.5—Cessation of existence; mergers and consolidations.

Subject to the provisions of § 563.16 of this subchapter, the termination of the existence of an insured institution by merger or consolidation shall terminate, as of the effective date of such merger or consolidation, the insured status of such insured institution and all rights of its insured members to insurance by this Corporation and its liability for insurance premiums, except premiums still unpaid (including current annual premium) shall cease as of such date.[6]

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[5] 12 CFR 563.16.

[6] 12 CFR 565.5; now § 565.6., 12 CFR 565.6.

§ 565.6—Cessation of existence; other cases.

In connection with any other case of cessation of existence of an insured institution, by lapse of charter, dissolution, voluntary liquidation, or otherwise than by reason of a default, the insured status of the insured institution, all rights of its insured members to insurance by this Corporation and its liability for insurance premiums, except premiums still unpaid (including current annual premium) shall cease, as of the date of the distribution of its final liquidating dividend.[7]

* * * * *

II. Chapter 2—National Banks. Organization and General Provisions.

Section 35. Organization of State Banks as National Banking Associations.

"Any bank incorporated by special law of any State or of the United States or organized under the general laws of any State or of the United States and having an unimpaired capital sufficient to entitle it to become a national banking association under the provisions of the existing laws may, by the vote of the shareholders owning not less than fifty-one per centum of the capital stock of such bank or banking association, with the approval of the Comptroller of the Currency be converted into a national banking association, with any name approved by the Comptroller of the Currency. * * * When the Comptroller has given to such bank or banking association a certificate that the provisions of this Act have been complied with, such bank or banking association, and all its stockholders, officers, and employees, shall have the same powers and privileges, and shall be subject to the same duties, liabili-

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[7] 12 CFR 565.6; now § 565.7, 12 CFR 565.7.

ties, and regulations, in all respects, as shall have been prescribed by the Federal Reserve Act and by the national banking act for associations originally organized as national banking associations." [8]

III. Chapter 16. Federal Deposit Insurance Corporation.

Section 1814. Insured banks subject to Act—Certificate. (b)

"Every national member bank which is authorized to commence or resume the business of banking, and which is engaged in the business of receiving deposits other than trust funds as herein defined, and every such national nonmember bank which becomes a member of the Federal Reserve System, and every State bank which is converted into a national member bank or which becomes a member of the Federal Reserve System, and which is engaged in the business of receiving deposits, other than trust funds as herein defined, shall be an insured bank from the time it is authorized to commence or resume business or becomes a member of the Federal Reserve System. The certificate herein prescribed shall be issued to the Corporation by the Comptroller of the Currency in the case of such national member bank, or by the Board of Governors of the Federal Reserve System in the case of such State member bank." * * *" [9]

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[8] 12 USC 35.

[9] 12 USC 1814 (b).

APPENDIX B(1).

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

THOMAS, *J.*

Defendant Federal Home Loan Bank Board (hereafter called Board) and Federal Savings and Loan Corporation (hereafter called Insurance Corporation) move to dismiss plaintiff Euclid National Bank's (hereafter called Euclid National) complaint for declaratory judgment. Admitted for the purpose of the motion and pertinent to its decision are these facts pled in the complaint:

Prior to its conversion on February 1, 1966, Euclid National was Euclid Savings Association (hereafter called Euclid Savings), chartered under the laws of Ohio. Pursuant to Section 403, of the National Housing Act, 12 U. S. C. A. § 1726 (1965), the accounts of Euclid Savings were insured by the defendant Insurance Corporation. Billed by the defendant Insurance Corporation, Euclid Savings on November 21, 1965 paid its annual premium of insurance on Euclid Savings' accounts.

On February 1, 1966, Euclid Savings converted to and became Euclid National under the National Banking Act, 12 U. S. C. A. § 35 (1965). Federal Deposit Insurance Corporation, of which Euclid National became a member on February 1, 1966, now insures Euclid National's savings accounts and credit obligations.

Upon its conversion on February 1, 1966 to a national bank, Euclid Savings ceased to be an insured institution under the National Housing Act. On February 4, 1966, plaintiff Euclid National demanded that defendant Board and defendant Insurance Corporation remit the allegedly unearned portion of the annual premium of $26,441.26

paid to the Insurance Corporation on November 21, 1965 to insure the savings accounts of Euclid Savings. Defendants Board and Insurance Corporation refused to remit.

The plaintiff prays for a judicial determination of its rights and defendants' obligations "under the Federal Housing Act and the National Banking Act and the Rules and Regulations of the Federal Savings and Loan Corporation." Neither in the complaint nor in its briefs does the plaintiff identify any federal statute or federal rule or regulation which either requires or permits the Board or the Insurance Corporation to remit any part of the annual insurance premium.

The National Housing Act in Section 404, 12 U. S. C. A. § 1727 (1965), provides for the payment and calculation of premiums on insurance in Section 404, 12 U. S. C. A. § 1727 (1965) and for the termination of insurance in Section 407, 12 U. S. C. A. § 1730 (1965). But nowhere in the Act is there any provision for a refund of premium. Actually the Act makes no provision for termination of insurance premiums upon conversion or even dissolution of a state savings and loan association. However, regulations of the defendant Board contained in 12 C. F. R. pt. 565 (1963), make provision for termination of insurance. Section 565.5 provides for cessation of existence by merger or consolidation. Section 565.6 covers any other case of cessation of existence of an insured institution. Under both section 565.5 and section 565.6, the insured institution's

> liability for insurance premiums, except premiums still unpaid (including current annual premium) shall cease * * *,

as of the date its existence ceases.

Euclid Savings' cessation is covered by either one or

the other of these regulations. Its liability for future insurance premiums is thereby limited to unpaid premiums "including current annual premiums." Benefiting by these regulations Euclid Savings escapes the burden of Section 407 of the National Housing Act, 12 U. S. C. A. § 1730 (1965) that upon the approved termination of a non-federal savings and loan association "as an insured institution,"

> such insured institution shall be obligated to pay, within thirty days after any such notice or order of termination, as a final insurance premium, a sum equivalent to twice the last annual insurance premium paid by it.

Euclid Savings was obligated to pay the entire current annual premium, as specified in regulatory Sections 565.5 and 565.6. Euclid National as successor to Euclid Savings, bound by this same requirement, is prohibited from seeking any refund of the "current annual premium" paid November 21, 1965.

Nevertheless, Euclid National argues that "it is clear from an examination of * * * Sections 563.16 and 565.5, that Congress realized that under certain situations an equitable adjustment of unearned premiums should take place and by reason thereof, ordered such to occur."

Regulations 563.16 and 565.5 are adopted by the Board rather than by Congress. Section 565.5 states that it is "subject to the provisions of Section 563.16" which provides, in part,

> That if the institution which is absorbed by such insured institution by such merger, consolidation, or purchase of bulk assets is an insured institution, the insured institution which has so absorbed such other insured institution shall receive a credit upon its future premiums of the unearned portion of any

premium of such absorbed institution to the extent that the same has been paid, and the unearned portion of any premium of such absorbed institution shall, to the extent that the same has not been paid, be canceled.

Section 563.16 provides only for crediting, not for refund, of "unearned portion of any premium." Section 563.16 pertains to the consolidation of two institutions, both insured by the Federal Savings and Loan Corporation. Under such circumstances the unearned portion of insurance premium of the absorbed institution is credited in favor of the absorbing institution. Section 563.16 does not deal with an institution insured by the Federal Savings and Loan Corporation that is converted or absorbed into a national bank, whose deposits then become insured by the Federal Deposit Insurance Corporation. Neither by statute nor by regulation is there provision or authority for crediting of insurance premiums by and between these two wholly separate governmental insuring agencies.

As with all insured institutions, in paying the annual insurance premium Euclid Savings knew that defendant Insurance Corporation did not expressly promise return of any portion of the premium if for any reason Euclid Savings' status as an insured institution ceased during the year. A review of the pertinent federal statutes and applicable agency regulations has revealed no provision from which a promise to refund a short-rate premium can be implied in law. In the absence of any express agreement, or agreement that may be implied in law, the ordinary rule applies that "an insured may not have any part of his premium returned once the risk attaches, even if it eventually turns out that the premium was in part unearned." *Fleetwood Acres v. Federal Housing Corp.*, 171 F. 2d 440, at 442 (2d Cir. 1948).

For the foregoing reasons the motion of defendants to dismiss plaintiff's complaint is granted.

/s/ WILLIAM K. THOMAS,
United States District Judge.

APPENDIX B(2).

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed May 7, 1968.)

Before: O'SULLIVAN, McCREE, and COMBS, Circuit Judges.

This is an appeal by the Euclid National Bank, formerly Euclid Savings Association, from a judgment of the District Court which holds that the bank is not entitled to recover certain insurance premiums paid to the Federal Savings and Loan Insurance Corporation.

The Euclid Savings Association was converted from an Ohio chartered building and loan association to the Euclid National Bank on February 1, 1966. During its life as a building and loan association its savings accounts were insured by the appellee Federal Savings and Loan Insurance Corporation under the provisions of the National Housing Act, 12 U. S. C. § 1727. When it became a national bank its deposits were insured by the Federal Deposit Insurance Corporation.

Under the terms of the National Housing Act the Euclid Savings Association became obligated on November 21, 1965, to pay an annual premium in advance to the Federal Savings and Loan Insurance Corporation. One-half of the premium was paid in November, 1965, and the other one-half was deferred to April, 1966, and then

paid pursuant to demand. The bank contends that the portion of the premium covering the period beyond February 1, 1966, when it became a national bank, is unearned and should be returned to it.

The trial judge held in a well reasoned memorandum opinion that there is no federal statute or agency regulation applicable to this situation and, in the absence of an express agreement or one that may be implied in law, the rule is that "an insured may not have any part of his premium returned once the risk attaches, even if it eventually turns out that the premium was in part unearned." Citing *Fleetwood Acres v. Federal Housing Administration*, 171 F. 2d 440, 442 (2nd Cir. 1948).

For the reasons stated in the District Judge's memorandum opinion, the judgment is affirmed.

Entered by order of the Court

/s/ CARL W. REUSS,
Clerk.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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MEMORANDUM FOR RESPONDENTS IN OPPOSITION

During petitioner's existence as the Euclid Savings Association, an Ohio-chartered building and loan association, its savings accounts were insured by the Federal Savings and Loan Insurance Corporation (Insurance Corporation) under the National Housing Act (48 Stat. 1255, 12 U.S.C. 1724, *et seq.*). On November 21, 1965, Euclid Savings Association became obligated to pay an annual premium in advance to the Insurance Corporation; one-half of the premium was paid at that time, and the remainder in April 1966 (Pet. App. B(2), p. 15).

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Upon its conversion to a national bank on February 1, 1966, petitioner's savings accounts and credit obligations were insured by the Federal Deposit Insurance Corporation. Petitioner then demanded that the Insurance Corporation and the Federal Home Loan Bank Board cancel the allegedly unearned portion of the annual premium for the period February-November 1966. When its demand was refused, petitioner instituted this action for a declaratory judgment of its right to a refund (Pet. App. B(1), pp. 11–12).

The district court dismissed the complaint, on the grounds that there was no provision in the statute or the regulations for refund of premiums and that in the absence of an agreement to the contrary "the ordinary rule applies that 'an insured may not have any part of his premium returned once the risk attaches, even if it eventually turns out that the premium was in part unearned' " (Pet. App. B(1), pp. 12–14). The court of appeals affirmed (Pet. App. B(2), p. 16).

1. When petitioner sought and accepted status as an insured institution, it knew of the requirement of advance payment of annual premium charges, and it had notice that there was no statutory or regulatory provision requiring or authorizing the refund of any unearned portions of the annual premium. Nor does petitioner allege any express agreement for a refund upon a voluntary conversion from a savings and loan association to a national bank. The courts below correctly applied the settled rule that in the absence of an express agreement for refund, once the insurer

assumes the risk of loss, an insured is not entitled to the return of any part of the premium, even if it develops that the premium was in part unearned. See, *e.g.*, *Fleetwood Acres* v. *Federal Housing Administration*, 171 F. 2d 440, 442 (C.A. 2); *In re Parker-Young Co.*, 12 F. Supp. 987, 988 (D. N.H.); *Thomas* v. *Charles Baker & Co.*, 60 F. 2d 1057, 1060 (E.D. Pa.). Contrary to petitioner's contention, the application of that rule in this case does not result in double collection of premiums or any undue enrichment of the insurer, for the parties' understanding is that "the insurance granted is consideration for the entire premium received if the risk has attached by reason of the contract becoming binding on the Insurer." *Jones* v. *St. Paul Fire & Marine Insurance Co.*, 118 F. 2d 237, 238 (C.A. 5).

Petitioner asserts (Pet. 4) that the question raised here is important to all federally insured savings institutions desiring to convert to a national bank. We are advised that petitioner is the only federally insured savings and loan association to convert to national bank status since 1949. Furthermore, it would seem that any institution desiring to convert may arrange the time of its conversion so as to avoid loss of unearned premium, in the event that is a material factor in the cost of conversion.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968